No. 641

In the Supreme Court of the United States

OCTOBER TERM, 1957

JEROME S. SPEVACK, PETITIONER

v.

LEWIS L. STRAUSS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. B, 6a–9a) is reported at 248 F. 2d 752.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1957. A petition for rehearing, timely filed, was denied October 25, 1957. The petition for a writ of certiorari was filed December 4, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the District Court lacked jurisdiction to entertain this suit because it constituted an unconsented suit against the United States.

2. Whether the court below improperly refused to remand the case to the District Court with permission to file an amended complaint.

3. Whether the Atomic Energy Act validly authorizes the publication of information of the type involved in this case.

4. Whether the controversy is moot.

STATUTES INVOLVED

The pertinent statutory provisons (as they appear in the United States Code) are as follows—

42 U. S. C. (Supp. IV) 2013:

> Purpose of chapter.
>
> It is the purpose of this chapter to effectuate the policies set forth above by providing for—
>
> * * * * *
>
> (b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;
>
> * * * * *
>
> (d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; * * *

* * * * * *

42 U. S. C. ~~(Supp. IV)~~ 2014:

Definitions.

* * * * *

(r) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2261 of this title.

* * * * *

42 U. S. C. (Supp. IV) 2161:

Policy of Commission.

It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. Consistent with such policy, the Commission shall be guided by the following principles:

(a) Until effective and enforceable international safeguards against the use of atomic energy for destructive purposes have been established by an international arrangement, there shall be no exchange of Restricted Data with other nations except as authorized by section 2164 of this title; and

(b) The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information.

42 U. S. C. (Supp. IV) 2162:

Classification and declassification of restricted data—(a) Periodic determination.

The Commission shall from time to time determine the data, within the definition of Restricted Data, which can be published without undue risk to the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data.

(b) Continuous review.

The Commission shall maintain a continuous review of Restricted Data and of any Classification Guides issued for the guidance of those in the atomic energy program with respect to the areas of Restricted Data which have been declassified in order to determine which information may be declassified and removed from the category of Restricted Data without undue risk to the common defense and security.

* * * * * *

42 U. S. C. (Supp IV) 2166:

Applicability of other laws.

(a) Sections 2161–2165 of this title shall not exclude the applicable provisions of any other laws, except that no Government agency shall take any action under such other laws inconsistent with the provisions of those sections.

(b) The Commission shall have no power to control or restrict the dissemination of information other than as granted by this or any other law.

STATEMENT

Petitioner was employed by a contractor of the Manhattan Engineering District, predecessor of the Atomic Energy Commission, from 1943 through 1946. During this period petitioner invented a dual temperature exchange process concerning the production of heavy water and assigned this invention to the Government (Subject of U. S. Patent 2,787,526 Patent Application SN 509581—issued to the A. E. C.). Petitioner claims to have made certain improvements on this process during 1946–1949, while not employed by the Government.

In 1949, petitioner was hired by the Atomic Energy Commission as a consultant under contract to the Government, to write a report with respect to the heavy water process. Certain of the information contained in the report was used in several Atomic Energy Commission installations which are operated by contractors for the Commission. Such contractors, in turn, prepared operating manuals describing these installations.

In December 1956, the Commission published a notice that it proposed to declassify heavy water information. On January 22, 1957, petitioner wrote to the Chairman of the Commission, requesting declassification of the subject matter of the two Spevack Patent applications (SN 509581 and SN 188925), as he desired to deliver a paper concerning them in Amsterdam in April 1957. On or about February 1, 1957, the two patent applications were declassified and the secrecy orders were rescinded. At the same time, the contractors' manuals and other reports were declassified. Thereafter, and prior to the filing of this suit, the Commission published certain Commission-owned materials, including the operating manuals, and placed them on library shelves and otherwise made them available to the public, which material incorporated the dual temperature exchange process for the production of heavy water.

On April 10, 1957, petitioner filed a complaint in the District Court for injunctive relief and obtained an *ex parte* temporary restraining order. As the Court of Appeals described it (Pet. App. B, 6a–7a):

> The appellant's complaint asked the District Court to enjoin the defendants, who are the members of the United States Atomic Energy Commission, and to enjoin also the "officers, agents, servants and employees, and anyone associated with or acting in concert or participation with said defendants, and their successors in office", from disclosing "the heretofore unpublished features" of appellant's patent application No. 188,925, which pertains to the production of heavy water and other isotopes.

> The complaint says such publication would defeat patent applications appellant plans to file in various foreign countries; that a "secrecy order" of the Commission formerly prohibited appellant from filing those applications; that if appellant had been able to file them within one year after he filed his patent application in the United States, in most countries his filing would have been regarded as "running from the date of" his United States application; and that the Commission has now rescinded the secrecy order and declassified the entire subject of the preparation of heavy water, including the plaintiff's patent application.

On April 17, 1957, respondents filed an opposition to the application for a preliminary injunction, supported by affidavits and points and authorities, in which they raised, *inter alia*, the questions of unconsented suit against the United States and mootness. Subsequent to hearings on the request for a preliminary injunction (April 18-19, 1957), the District Court, which rejected the defense of unconsented suit, denied the request on the ground of mootness, holding that the materials had already been declassified and published. The Court of Appeals did not reach the question of mootness, holding that the complaint should have been dismissed for lack of jurisdiction since the action was an unconsented suit against the United States. The court thereafter denied a rehearing and motion to amend the complaint.

ARGUMENT

1. Petitioner, in his complaint, sought an order from the court requiring the members of the Atomic

Energy Commission not to publish certain information concerning the production of heavy water and isotope concentration by the dual temperature exchange method. While the United States is not made a defendant, the suit in reality is one against the United States rather than against the individuals named in the complaint and it must therefore fail on jurisdictional grounds for lack of an indispensable party.

It is axiomatic that the United States cannot, without its consent, be sued in any court. *Larson* v. *Domestic and Foreign Corporation*, 337 U. S. 682.[1] It is equally well settled that whether the suit is one against the United States or against an individual depends upon the substantial nature and effect of the proceedings. *Land* v. *Dollar*, 330 U. S. 731, 738. The denomination of the parties is not controlling. *Larson* v. *Domestic and Foreign Corporation*, *supra*; *Wells* v. *Roper*, 246 U. S. 345. As this Court phrased it in the *Larson* case, *supra* (337 U. S. at 688):

> In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained. As indicated, this question does not arise because of any distinction between law and equity. It arises whenever

[1] See, also, *Louisiana* v. *McAdoo*, 234 U. S. 627; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Doehla Greeting Cards* v. *Summerfield*, 227 F. 2d 44 (C. A. D. C.); *Seiden* v. *Larson*, 188 F. 2d 661 (C. A. D. C.), certiorari denied, 341 U. S. 950; *Young* v. *Anderson*, 160 F. 2d 225 (C. A. D. C.), certiorari denied, 331 U. S. 824.

> suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong but, rather, the prevention or discontinuance, *in rem* of the wrong. In each such case the compulsion which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction.

Reference to the complaint indicates that the relief sought by petitioner against respondents is not in their private or personal capacity, but rather against them as officers of the sovereign and agents of the Government. Being such, the compulsion sought is, in reality, compulsion against the sovereign. The *Government* is to be enjoined from disclosing certain information now in *its* possession, information which the Government claims the right to publish. Admittedly, the complaint did not allege that respondents were acting in excess of their statutory authority nor, if they were, that the statute under which they were acting was unconstitutional. Therefore, petitioner having failed to allege in his complaint one of the general exceptions from the principle of sovereign immunity, this suit must fail as one against the United States to which no consent has been given, and the decision of the Court of Appeals directing that the complaint be dismissed for lack of jurisdiction was correct.

2. Petitioner contends that the court below abused its discretion in refusing to remand to the District Court with directions that he be permitted to file an amended complaint, alleging that respondents were acting outside the scope of their authority or that if they were acting within the scope of their statutory authority the statute was unconstitutional. He also asserts a violation of Rule 15 (a) of the Federal Rules of Civil Procedure, relating to amendments of pleadings.

As to any alleged violation of Rule 15 (a), it is to be observed that, although respondents had filed only an opposition to the application for a preliminary injunction, that opposition was supported by affidavits and points and authorities raising the question of sovereign immunity. Petitioner did not then seek to amend his complaint while he had a right to do so. It was only after the adverse decision of the court below, on appeal, that he sought leave to amend. By then, however, the case had progressed too far. It had properly become a matter of sound judicial discretion as to whether leave to amend should then be granted, and we submit that the court below did not abuse its discretion in refusing to grant leave at that late stage.

3. (*a*). In any event, the statute conferred authority upon respondents to release information of the category involved in this case. As the court below observed, the statute creating the Atomic Energy Commission, 42 U. S. C. (Supp. IV) 2013 (b), 2161, 2161 (b), *supra*, pp. 2–4, "authorized the Commission to take action of this general sort; *i. e.*, to disseminate technical

information in the field of atomic energy. Congress did not leave the matter to implication. It expressly stated its intention to provide 'a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress * * * It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security * * * The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged * * *'" (Pet. App. B, 7a).

Congress has provided that the Commission shall have the authority to determine what shall or shall not be regarded as secret with respect to alleged atomic energy inventions, in circumstances such as those presented here. The action of respondents in declassifying the material here involved and in authorizing its publication was, as the court correctly ruled, not only authorized but almost required by the Act when the respondents had determined, in the exercise of the discretion committed to them by the statute, that the purpose of the Act would best be served by such publication.[2]

[2] Neither petitioner nor the *amici curiae* in their briefs before this Court point out any specific departure by respondents from the ambit of their statutory authority. Their complaints as to the wisdom of the statute are more properly addressed to Congress rather than to the courts.

(*b*). The statute is constitutional. In terms, it specifically provides for compensation in many instances where the inventor is precluded from obtaining a patent or in other ways is deprived of the fruits of his invention. See *e. g.*, Sections 151 (a) (b), 152, 153 (a) (g), 42 U. S. C. (Supp. IV) 2181, 2182, 2183. There is nothing in the Act which expressly precludes the payment of just compensation in other circumstances *where there is a taking*. If, as petitioner contends, the action of the respondents, in carrying out of the purpose of the Act, has in effect deprived him of a property right, and he can demonstrate that to the satisfaction of a proper court, such as the Court of Claims, it is reasonable to assume that the court which would be called upon to entertain the claim would find that there was a taking which calls for compensation under the Fifth Amendment. *Hurley* v. *Kincaid*, 285 U. S. 95, 104; cf. *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18; *United States* v. *Causby*, 328 U. S. 256.

The authority thus conferred by the statute, and its plain validity, furnish additional reasons why the court below did not abuse its discretion in refusing to permit petitioner to amend his complaint. The end result would have been the same—petitioner could not maintain his suit against respondents either upon the ground that they had acted in excess of their statutory authority or under color of an invalid statute.

4. After the complaint was filed, it was learned that certain dissemination had been made by the Commission. Such proof was thereupon submitted to the District Court which found that publication

had already taken place, rendering the action moot. *Supra*, pp. 6, 7. The Court of Appeals did not reach the question of mootness; however, we submit that petitioner cannot surmount this additional barrier. It would be a futile thing for a court to enjoin the respondents from publishing that which has already been published. For, as the cases have repeatedly held, courts will refuse to do an idle act where it is beyond a party's power to comply. *United States* v. *Dern*, 289 U. S. 352, 360; *Ex parte Wagner*, 249 U. S. 465, 469; *Garfield* v. *United States ex rel. Turner*, 31 App. D. C. 332, affirmed, 222 U. S. 204; 30 C. J. S., *Equity*, § 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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